ABU BAKAR JAAFAR & ANOR.

v.

MALAYAN BANKING BHD.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[ORIGINATING MOTION NO. 25-69-90]
30 NOVEMBER 1990

BANKRUPTCY: *Freezing of accounts - Knowledge of bankruptcy notice - Doctrine of relation back - Dealings by or with bankrupt after commencement of bankruptcy - Certain transactions protected - Meaning of "notice" - Bona fide transaction - Bankruptcy Act 1967, ss. 47(1), 54(1).*

The plaintiffs A & K are customers of the defendant MBB at its BL branch; A has a personal account while K has a fixed deposit account. In 1987, UAB sued P (of which both A & K were partners) and A & K for monies owed under a letter of hypothecation. UAB obtained default judgment against A & K for RM25,085.71 and then issued a bankruptcy notice by way of substituted service in "The Star" dated 10 September 1990. As a result of this notice in "The Star", MBB froze A & K's accounts, acting under s. 47(2) of the Bankruptcy Act 1967 (the Act). A & K claim that MBB is not entitled to freeze their accounts.

The issue in this case is whether MBB is justified in freezing the accounts of A & K soon after it had notice of the bankruptcy notice in "The Star" on 10 September 1990.

Held:

[1] Under s. 47(1) of the Act, the property of the bankrupt shall vest in the Official Assignee only upon the making of the adjudication order. However, the title of the Official Assignee, under the doctrine of "relation back", is related back from the date of adjudication to the commencement of the bankruptcy.

[2] Any dealings by or with the bankrupt after the commencement of the bankruptcy is *prima facie* invalid and can subsequently be set aside by the Official Assignee.

[3] However, under s. 54(1) of the Act, certain transactions entered into by the bankrupt are protected from the operation of the doctrine of "relation back".

[4] (a) The defendant was justified in its action in freezing the plaintiffs' accounts because it has knowledge of the issuance of bankruptcy notice against the plaintiffs.

(b) Unlike s. 54 of the Singapore Bankruptcy Act (Cap. 18) and the English 1914 Act, our s. 54(3) goes further to state that for the purpose of the section, "notice" includes knowledge of an act of bankruptcy or of any bankruptcy proceedings or of facts sufficient to indicate to the person dealing with the debtor the commission of an act of bankruptcy, and a debtor commits an "act of bankruptcy" if a bankruptcy notice requiring him to pay the judgment debt has been served on him (s. 3(1)(i)).

(c) It follows, therefore, if the defendant were to make any payment to the plaintiffs under s. 54(1)(b) knowing full well of the bankruptcy notice issued against the plaintiffs it cannot subsequently say that this was a *bona fide* transaction under s. 54(1) of the Act.

[Plaintiff's application dismissed.]

Legislation referred to:
Bankruptcy Act 1967, ss. 47, (1), (2), 54(1), 54(1)(b)

Other source referred to:
Bankruptcy, The Law and Practice, Butterworth by Catherine Tay Swee Kian, p. 56

For the Plaintiffs - Teja Singh Peneser; M/s. Teja Singh Peneser & Co.
For the Defendant - Chew Sien Chee; M/s. Wong-Chooi & Mohd. Nor

JUDGMENT

Mohamed Dzaiddin J:

By this Notice of Originating Motion the plaintiffs seek a declaration that the defendant is not entitled to freeze their accounts maintained in the defendant's bank and for loss and damage as a result of the defendant's action and costs.

The brief facts of the matter are these. Both plaintiffs are customers of the defendant at its Bayan Baru branch. The 1st plaintiff maintains a personal account, whilst the 2nd plaintiff has fixed deposit account with the defendant. Sometime in April 1987, another bank i.e. United Asian Bank sued Pen Trading Co. and both plaintiffs, being partners of the said firm, for recovery of money owed by the firm under the letter of hypothecation dated 11 March 1981. The service of the summons against them was effected by substituted service in "The Star" newspaper dated 15 October 1987. Despite the advertisement, the plaintiffs did not enter appearance or defence and as a result the United Asian Bank obtained a default judgment against them in the sum of RM25,085.71 with interest and costs. Subsequently, the said bank issued bankruptcy notice *vide* Bankruptcy No. 29-2146-89 against both plaintiffs, also by way of substituted service in "The Star" dated 10 September 1990. In the meantime, the defendant bank became aware of this advertisement and by letter dated 21 September 1990, the defendant informed the plaintiffs that their respective accounts have been frozen until further notice. On enquiries made by the plaintiffs, the defendant informed them that the bank acted under s. 47(2) of the Bankruptcy Act 1967 (the Act). This subsection reads as follows:

> No bankruptcy petition, receiving order adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor.

The crucial issue in this application is whether or not the bank is justified in freezing the accounts of the plaintiffs soon after it has notice of the bankruptcy notice appearing in "The Star" on 10 September 1990.

Encik Chew, for the defendant, submitted that it was justified for the bank to freeze both accounts because being aware of the bankruptcy notice having been issued against the plaintiffs, the doctrine of "relation back" under s. 47 would apply against the bank and it could not later avail itself of the protection provided under s. 54(1)(b) of the Act. In short, it meant that under s. 47(1) the bankruptcy of a debtor related back to and commenced at the time of the act of bankruptcy being committed. Encik Teja, for the plaintiffs, on the other hand, submitted that s. 47 would only apply after the making of the adjudication order and until such time the plaintiffs are entitled to deal freely with their money in their respective accounts.

As has been seen, under s. 47(1) of the Act, the bankruptcy of a debtor shall be deemed to have "relation back" to and commence at the time of the act of bankruptcy being committed on which a receiving order is made against the bankrupt. Hence, the property of the bankrupt shall vest in the Official Assignee only upon the making of the adjudication order. However, the title of the Official Assignee, under the doctrine of "relation back", is related back from the date of adjudication to the commencement of the bankruptcy. See: *Catherine Tay Swee Kian on Bankruptcy, The Law and Practice*, Butterworth p. 56. Therefore, any dealings by or with the bankrupt after the commencement of the bankruptcy is *prima facie* invalid and can subsequently be set aside by the Official Assignee. However, under s. 54(1) of the Act, certain transactions entered into by the bankrupt are protected from the operation of the doctrine of "relation back". Section 54(1) reads as follows:

> (1) Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in this act shall invalidate in the case of bankruptcy:
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> (a) any payment by the bankrupt to any of his creditors;
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> (b) any payment or delivery to the bankrupt;
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> (c) any conveyance or assignment by the bankrupt for valuable consideration;
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> (d) any contract, dealing or transaction by or with the bankrupt for valuable consideration if:
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> (i) the payment, delivery, conveyance, assignment, contract, dealing or transaction, as the case may be, takes place before the date of the receiving order; and
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> (ii) the person other than the debtor to by, or with whom the payment, delivery, conveyance, assignment, contract, dealing or transaction was made, executed or entered into has not at the time of the payment, delivery, conveyance, assignment, contract, dealing or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time.

The effect of s. 54(1) is that transactions under (a) to (d) are protected and their validity are not affected by the doctrine provided that such transactions take place before the date of the receiving order and the person other than the debtor by whom the payment was made has not at the time of the payment notice of any available act of bankruptcy committed by the bankrupt before that time. This is the crux of the matter. The defendant believes that because it has notice of the bankruptcy notice having been issued by United Asian Bank Bhd. against the plaintiffs as advertised in "The Star", it cannot, therefore, claim protection under the proviso to s. 54(1) of the Act.

After hearing the submissions of Counsel and on a proper reading of s. 54 of the Act, in my opinion the defendant was justified in its action in freezing the plaintiffs' accounts because it has knowledge of the issuance of bankruptcy notice against the plaintiffs. Unlike s. 54 of the Singapore Bankruptcy Act (Cap. 18) and the English 1914 Act, our s. 54(3) goes further to state that for the purpose of the section, "notice" includes knowledge of an act of bankruptcy or of any bankruptcy proceedings or of facts sufficient to indicate to the person dealing with the debtor the commission of an act of bankruptcy, and a debtor commits an "act of bankruptcy" if a bankruptcy notice requiring

him to pay the judgment debt has been served on him (s. 3(1)(i)). It follows, therefore, if the defendant were to make any payment to the plaintiffs under s. 54(1)(b) knowing full well of the bankruptcy notice issued against the plaintiffs it cannot subsequently say that this was a *bona fide* transaction under s. 54(1). In the result, upon the plaintiffs being adjudged bankrupt the doctrine of "relation back" under s. 47(1) would apply to the defendant. In conclusion, I ought to mention here that in view of the clear definition of "notice" in sub-section (3), any consideration of the English authorities on the matter will be irrelevant.

For the above reasons, I dismiss the plaintiffs' application.

Also found at [1991] 1 CLJ 492